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NO. 90-1469

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM H. HERNSTADT and JUDITH HERNSTADT,

Petitioners,

v.

BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

HENRY MARK HOLZER and
HALL, O'BRIEN AND SACK, P.A.
GARY B. SACK
RICHARD F. O'BRIEN, III
1428 Brickell Avenue
Miami, Florida 33131
(305) 374-5030
Attorneys for Petitioners

QUESTION PRESENTED

Does federal procedural due process allow a state trial court on remand, without an evidentiary hearing, to enter judgment on a counterclaim that had not been adjudicated at the initial trial and not briefed, argued or decided on appeal?

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BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

Petitioners, William H. Hernstadt and Judith Hernstadt, request that a Writ of Certiorari issue to review the order of the District Court of Appeal of the Third District of Florida issued on April 3, 1990, rehearing

denied June 4, 1990, reported as Hernstadt v. Brickell Bay Club Condominium, 560 So.2d 1227 (Fla. 3d DCA 1990). That order affirmed the trial court's entry of judgment on remand in favor of defendant on its counterclaim which had neither been adjudicated in the original trial nor briefed or argued in, or decided by, the Third District Court of Appeal. (Discretionary review was denied by the Supreme Court of Florida in an order dated November 16, 1990).

OPINIONS BELOW

In granting judgment for plaintiffs on their complaint based on a real estate dispute, the original trial court made findings of fact and conclusions of law, but rendered no reported opinion in conjunction with its final judgment. On an appeal from the substantive real estate issue decided by the trial court, the Third District Court of Appeal rendered a written opinion which is published as Brickell Bay Club Condominium v. Hernstadt, 512 So.2d 994 (Fla. 3d DCA 1987). The remand trial court's unreported opinion, granting defendant judgment on its counterclaim, is set forth hereto as Appendix "A". The Third District Court of Appeal's opinion affirming the remand court and rejecting Petitioner's due process challenge, is reported as Hernstadt v. Brickell Bay Club

Condominium, 560 So.2d 1227 (Fla. 3d DCA 1990).

JURISDICTION

As stated above, discretionary review of the Third District Court of Appeal order of April 3, 1990 was denied by the Supreme Court of Florida on November 16, 1990. This Court has jurisdiction of this Petition pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

There is but one federal Constitutional provision involved: the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Although the question presented by this Petition for a Writ of Certiorari is one of procedural due process deprivation by a state judicial system, the case began in the Florida trial court as a real estate dispute. Petitioners sought a declaratory judgment that Respondent was estopped to deny them the use of an existing air-conditioning structure located partially above the roof line, but connected to their condominium unit. Respondent counterclaimed, seeking removal of the structure, physical restoration of the roof, and money damages. The trial judge found that because Respondent was estopped, Petitioners were entitled to the exclusive use and occupancy of the roof structure. A judgment for Petitioners was duly entered. Under the circumstances, of course, no judgment was rendered for Respondent on its counterclaim.

Respondents appealed, disputing the trial court's finding that an estoppel existed. Respondent's briefs in the appellate court contained no mention of its counterclaim. Respondent's oral argument in the appellate court was silent concerning its counterclaim. It is fair to say that in the Third District Court of Appeal Respondent had abandoned its counterclaim. Thus, it was no surprise that the appellate panel's reversal had nothing to say about Respondent's counterclaim and only addressed the trial judge's estoppel finding:

> [Petitioners] contend that the failure of [Respondent] to at least attempt affirmatively to prevent the renovations justifies application of waiver and estoppel principles. We disagree. (512 So.2d at 996).

Accordingly, the appellate court remanded with instructions "to enter judgment for [Respondent]." Id. at 997.

Petitioners then unsuccessfully sought discretionary review in the Supreme Court of Florida.

The proceedings then returned to the remand trial court where Respondents asked a different trial judge to enter a judgment not only dismissing Petitioner's complaint, but also "entering judgment on [Respondent's] counterclaim."

Without any evidentiary proceedings, the new remand trial court obliged. Judgment was entered on Respondent's counterclaim. It directed Petitioners to remove the roof structure and to restore the roof, and it awarded money damages. Petitioners' request for rehearing in the new remand trial court was denied.

Petitioners then appealed to the Third District Court of Appeal. They argued that since Respondents' counterclaim had not been

adjudicated in the trial court initially, or briefed, argued or decided in the appellate court, that court's remand instruction -- "enter judgment for [Respondent]" -- could have meant only that the remand court was to enter a judgment for Respondent dismissing Petitioners' complaint. For the appellate court to instruct the remand court to enter a judgment on Respondent's non-adjudicated, non-briefed, non-argued, non-decided counterclaim, Petitioners argued, would violate their federal procedural due process rights.

The Third District Court of Appeal disagreed, finding the "contention [to be] without merit." Hernstadt, supra, 560 So.2d 1227, 1228.

Petitioners sought discretionary review in the Supreme Court of Florida, which was denied.

REASONS FOR GRANTING THE WRIT

The facts of this case are not disputed. A bench trial in a real estate dispute ended in a judgment for Petitioners because Respondent was found estopped. Respondent's counterclaim was not adjudicated. On appeal, Respondent neither briefed nor argued its counterclaim. The appellate court thus did not adjudicate Respondent's counterclaim. It did, however, find that estoppel was inapplicable, and reversed and remanded. The remand court entered judgment dismissing Petitioners' complaint. That court also entered judgment in favor of Respondent on its counterclaim. No evidentiary hearing of any kind was held.

These facts give rise to an important question (stated above) implicating the relationship between state trial court control of civil litigation and the requirements of

federal procedural due process concerned with notice and an opportunity to be heard.

That question, actually and potentially affecting all civil litigation, has not been directly addressed by this Court in the form that it arises in this case.

There are, of course, a line of NLRB "switched theory" cases where the courts of appeals have held that procedural due process is violated when the Board makes a decision on grounds not considered and/or adjudicated at lower agency levels. (See, e.g., NLRB v. Pepsi-Cola Bottling Co. of Topeka, Inc., 613 F.2d 267 (10th Cir. 1980); Facet Ent. v. NLRB, 907 F.2d 963 (10th Cir. 1990).[1]

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[1] A corollary of the principle represented by the NLRB cases is that, as this Court observed in Dothard v. Rawlinson, 433 U.S. 321 (1977), reviewing courts are not ordinarily justified in relying on arguments that were not made in the trial court and preserved for appellate review. If this be true, it is difficult to understand how, consistent with the requirements of federal

On the state side, two of this Court's cases underscore the importance of the question presented here.

Although the facts of this case differ from those in Bouie v. City of Columbia, 378 U.S. 347 (1964), the principle which underlies Bouie would seem to be applicable here. In Bouie, appellate action had unacceptable retroactive consequences. Here, the remand trial court entered a judgment on a previously non-adjudicated counterclaim. If the unifying principle is judicial conduct (at any level) which deprives a litigant of notice and opportunity to be heard concerning a potential loss of property, Bouie would suggest that its focus on appellate action should be equally applicable to trial action. In principle, it

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procedural due process, a remand trial court can render judgment on a counterclaim which was not adjudicated at the initial trial and neither briefed, argued nor decided on the appeal.

would appear irrelevant whether the judicial action which deprives procedural due process is solely appellate, as in Bouie, or whether a remand trial court accomplishes the same result by enlarging on an appellate decision. Either way, the impact on the litigant, and the deprivation, is the same.

Cole v. Arkansas, 333 U.S. 196 (1948) -- although a criminal case, and one where the procedural due process deprivation occurred on appeal, rather than on remand -- is nevertheless instructive. There, the question was whether Petitioner was denied procedural due process when his conviction was affirmed under a criminal statute whose violation he had not been charged with. In words which could just as easily apply to the situation presented in the instant case, this Court observed that it is as much a violation of procedural due process for a defendant to be

sent to prison based on a charge on which he was not tried, as it would be to convict him on a charge that was never made. One could say that it is as much a violation of procedural due process for a civil litigant to be saddled with a judgment based on a non-adjudicated, non-briefed, non-argued, non-decided counterclaim, as it would be to enter a judgment against that litigant on a counterclaim that was never pleaded.

Yet the former situation is exactly the one which occurred in the Florida remand trial court here. Surely, when Petitioners left the Third District Court of Appeal they had every right to believe that they also left behind Respondent's apparently abandoned counterclaim. Yet the remand court obviously thought otherwise, giving rise to the question which Petitioners ask this Court to review. As Petitioners noted above, that question --

"Does federal procedural due process allow a state trial court on remand, without an evidentiary hearing, to enter judgment on a counterclaim that had not been adjudicated at the initial trial and not briefed, argued or decided on appeal?" -- implicates the relationship between state trial court control of civil litigation and the requirements of federal due process concerned with notice and opportunity to be heard.[2]

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[2] Although in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), this Court rejected the disciplined lawyer's argument that "the theory relied on by the [disciplinary board and then the Ohio Supreme Court] as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint." (471 U.S. at 654), the underlying rationale for the Zauderer decision cuts the other way here. What appeared significant to the Zauderer Court was "that the Board's recommendations put [Zauderer] on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio [the ultimate disciplinary authority]." (471 U.S. at 654). The same was not true here: not until Petitioners were in the remand trial court did they again encounter Respondent's

CONCLUSION

Wherefore, Petitioners respectfully request that this Honorable Court issue a Writ

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counterclaim, which no one had addressed in any manner whatsoever since the initial pleadings -- not in the original trial judgment, not in the decision. Here, whether or not the remand trial court's entry of judgment on Respondent's abandoned counterclaim was comparable to the Zauderer Disciplinary Board's "surprise exercise of judicial notice" to which Justices Brennan and Marshall objected (471 U.S. at 672), surely Petitioners were surprised when, in the new remand trial court, Respondent's long-gone counterclaim suddenly reappeared. Their position there was as untenable as Mr. Zauderer's when he reached the Ohio Supreme Court. As Justice Brennan said: "All that Zauderer could do was to argue that the Board's report was grounded on a theory that he had never been notified of and that he never had an opportunity to challenge...." (471 U.S. at 672). Here, all that Petitioners could do in the remand trial court -- even if they had fully known what was about to happen concerning the counterclaim -- was to argue that it was not fair. To paraphrase Justice Brennan, the mere opportunity unsuccessfully to bring such a procedural violation to the attention of the tribunal about to visit it on Petitioners did not provide them with the meaningful "chance to be heard" on the counterclaim. (471 U.S. at 473, fn. 21, citing Cole v. Arkansas, 333 U.S. 196 (1948).

of Certiorari to review the order of the District Court of Appeal of the Third District of Florida.

HENRY MARK HOLZER, ESQ.
and
HALL, O'BRIEN AND SACK, P.A.

By: _____
GARY B. SACK, ESQ.
1428 Brickell Avenue
Penthouse
Miami, Florida 33131
(305) 374-5030
Counsel for
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 12th day of February, 1991 to Paul A. Louis, Esq., Sinclair, Louis, Segal, et al., 1125 Alfred I. Dupont Building, 169 E. Flagler Street, Miami, FL 33131 and Jeffrey D.

Rubinstein, Esq., Sun Bank Building, Suite 708, 777 Brickell Avenue, Miami, FL 33131.

HALL, O'BRIEN AND SACK, P.A.
1428 Brickell Avenue
Penthouse
Miami, Florida 33131
(305) 374-5030

By: _____
GARY B. SACK

4017A311.PET

APPENDIX

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 82-7186 CA 18

WILLIAM HERNSTADT and JUDITH HERNSTADT, his wife,	)
Plaintiffs/Counter-Defendants,	)
vs.	)
BRICKELL BAY CLUB CONDOMINIUM ASSOCIATION, INC.,	)
Defendants/Counter-Plaintiffs.	)

FINAL JUDGMENT ON MANDATE

THIS CAUSE having come before the Court on the 22nd day of September, 1988 on the Motion for Entry of Final Judgment on Mandate of Defendant/Counter-Plaintiff, BRICKELL BAY CONDOMINIUM ASSOCIATION, INC., and this Court having heard argument of counsel for the respective parties and being otherwise duly and fully advised in the premises, it is

ORDERED AND ADJUDGED:

1. That the Final Judgment entered 6 February, 1985 be and the same is hereby vacated except paragraphs 2 and 4 thereof which, as modified, are incorporated herein.

2. That the relief sought by Plaintiffs/Counter-Defendants in their complaint be and the same is hereby denied.

3. That the relief sought by Defendant/Counter-Plaintiff in its Counterclaim be and the same is hereby granted and WILLIAM HERNSTADT AND JUDITH HERNSTADT shall henceforth cease and desist from using the roof structure which was the subject matter of this action as part of their living quarters and remove any and all furnishings, equipment and appurtenances thereto (except their air-conditioning equipment) and shall forthwith restore said roof structure and

ceiling to its previous state and condition at their own cost and expense.

4. BRICKELL BAY CONDOMINIUM ASSOCIATION, INC. be and is hereby awarded compensation for the use of the roof structure by WILLIAM HERNSTADT AND JUDITH HERNSTADT retroactive to the date of purchase of Terrace Suite A by WILLIAM HERNSTADT and JUDITH HERNSTADT and the Court reserves jurisdiction to determine the amount of same.

5. BRICKELL BAY CONDOMINIUM ASSOCIATION, INC. be and is hereby awarded and shall have, receive and recover against the WILLIAM HERNSTADT AND JUDITH HERNSTADT the sum of $5,114.90 for unpaid assessments against Terrace Suite A through and including the month of May, 1984, for which sum let execution issue, and the HERNSTADTS shall pay all proper assessments accruing after May 1984.

6. The Court reserves jurisdiction over this cause to determine the amount of attorneys' fees and costs to be awarded to BRICKELL BAY CONDOMINIUM ASSOCIATION, INC. against WILLIAM HERNSTADT AND JUDITH HERNSTADT for services rendered in the trial court, appeal to the Third District Court of Appeals and for resisting the petition for discretionary review in the Supreme Court of Florida, and further reserves jurisdiction to enforce all the provisions hereof.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 22nd day of September, 1988.

/s/ Robert H. Newman
CIRCUIT COURT JUDGE

Copies Furnished To:
Jeffrey D. Rubinstein, Esq.
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Sinclair, Louis, Siegel, Heath,
Nussbaum & Zavertnik, P.A.
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